

**UNITED STATE OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19**

MACHINISTS DISTRICT LODGE 160  
LOCAL LODGE 289

and

SSA MARINE

Case 19-CD-502

and

INTERNATIONAL LONGSHORE AND  
WAREHOUSE UNION, LOCAL 19

**INTERNATIONAL LONGSHORE & WAREHOUSE UNION, LOCAL 19'S  
POST HEARING BRIEF**

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## **I. INTRODUCTION**

In 2007, the Port of Seattle began the construction of a state of the art cruise ship terminal at Terminal 91, a facility that had previously been used for transshipment of refrigerated cargo and automobiles. The new cruise terminal opened in April, 2009, and is operated by SSA Marine. SSA Marine subcontracted the maintenance and repair work at Terminal 91 to Harbor Industrial Services Corp.; the work itself is performed by ILWU-represented mechanics working under a single, coastwide collective bargaining agreement which covers roughly 25,000 longshore workers, marine clerks, and mechanics employed by about 70 PMA-member companies, including SSA Marine and Harbor Industrial. SSA Marine awarded this work to ILWU-represented mechanics because it, along with all other PMA-member companies, agreed in 2008 longshore negotiations to award maintenance and repair work at “new” facilities to ILWU in exchange for the introduction of robotics, and to offset the resulting erosion of longshore jobs. As will be shown, when all relevant factors are considered, including the industry-wide settlement of work assignments and job security for ILWU workers in the face of automation, the preference for ILWU expressed by SSA and PMA clearly favors maintenance of the status quo, under which the disputed work is performed by ILWU-represented mechanics.

## **II. STATEMENT OF FACTS**

### **A. Procedural History**

In April 2009, IAM became aware that SSA Marine and PMA were planning to assign maintenance and repair work at the new cruise ship terminal at Terminal 91 to longshore mechanics represented by ILWU. (Joint Exhibit (“Exh. J”)-3 (*Factual Stipulation*) ¶25). IAM filed a grievance under its collective bargaining agreement with SSA Marine, claiming the work for its members. (Id.). SSA Marine proceeded to arbitration with IAM on this issue on May 1,

2009. (Exh. J-3 ¶26). Neither ILWU nor PMA received either notice of or an opportunity to participate in the IAM arbitration. The IAM arbitrator's May 8, 2009 award ordered SSA Marine to assign the Terminal 91 work to IAM members and pay lost pay damages. (Exh. J-3 ¶26; Exh. J-12 (*Arbitration Decision*)). On May 12, 2009, SSA Marine received a letter from IAM Business Agent Don Hursey, threatening that IAM would take "all actions necessary," including picketing, to obtain reassignment of the work back to IAM.<sup>1</sup> (Exh. J-3 ¶27; Exh. J-13; Tr. 32 (*DeNike*)). On May 14, 2009, ILWU counsel Rob Remar wrote to PMA counsel stating that ILWU rejected the IAM Arbitrator's Award and demanding that the work remain with ILWU. (Exh. J-3 ¶28; Exh. J-14; Tr. 33 (*DeNike*)).

On June 9, 2009, SSA Marine filed the instant unfair labor practice charge, No. 19-CD-502, against IAM for the purpose of obtaining a §10(k) hearing and award.<sup>2</sup> (Exh. J-3 ¶29; Exh. J-1; Board Exhibit ("Exh. Bd.")-1(a)). The parties stipulated that reasonable cause existed to believe there has been a violation of §8(b)(4)(D), and agreed to schedule a §10(k) hearing without further pre-hearing evidence from any party. (Exh. J-3 ¶¶1-2; Exh. J-2, J-4). The parties stipulated that SSA Marine is an employer engaged in commerce within the meaning of Sections 2(6) and 2(7) of the NLRA, and that IAM and ILWU are labor organizations within the meaning of Section 2(5). (Exh. Bd-2). The parties have also stipulated that SSA Marine is not failing to conform to an order or certification of the Board, that both IAM and ILWU claim the work in dispute, and that there is no agreed upon method for voluntary adjustment of the dispute. (Tr.

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<sup>1</sup> IAM has informed all parties that it would hold in abeyance any proposed activity until the Board addressed the matter, but reserved "the option to take the action it deems appropriate." (Exh. J-3 ¶30).

<sup>2</sup> On June 23, 2009, PMA moved to intervene. (Exh. Bd-1(f)). ILWU supported PMA's motion, IAM opposed it, and SSA Marine expressed no objection to PMA's intervention. (Exh. Bd-1(k)). On June 25, 2009, Region 19 denied PMA's motion on the grounds that there had been "no demonstration that the interests of PMA could be adversely impacted by any remedy arising out of this proceeding." (Id.).

11-12). The hearing on this matter took place on June 30 through July 2, 2009 at NLRB Region 19 in Seattle, Washington, before Hearing Officer Sara Dunn.

**B. Labor And Management Parties To This Action**

SSA Marine is a Washington corporation, with its headquarters in Seattle, Washington. (Exh. J-3 ¶5). SSA Pacific is a subsidiary of SSA Marine that provides stevedoring and related services at the Smith Cove Cruise Terminal, located at Terminal 91 in the Port of Seattle. (Id.). SSA Marine is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act. (Id.). For over 40 years, SSA Marine, its affiliates, and its predecessors have operated and managed terminals and provided stevedore services at various ports located on the West Coast, including the Puget Sound in Washington. (Exh. J-3 ¶6). SSA Marine, directly or through its predecessors, has been a member of non-party Pacific Maritime Association (“PMA”) since the 1940s. (Exh. J-3 ¶8). PMA is the labor relations representative for most waterfront employers on the West Coast, including SSA Marine. (Exh. Bd.1(f); Tr. 143 (*Weber*)). PMA negotiated the collective bargaining agreement under which ILWU mechanics perform the disputed work. (Id.).

The International Longshore and Warehouse Union (“ILWU”) serves as the certified collective bargaining representative of a single, coastwise bargaining unit consisting of approximately 25,000 longshore workers, longshore mechanics and marine clerks, employed in all West Coast ports by approximately eighty (80) stevedore, marine terminal, and steamship line companies who belong to the PMA. (Exh. J-3 ¶8). In the Port of Seattle, longshore workers are represented by ILWU Local 19. (Tr. 248-249 (*Harriage*)).

Both IAM- and ILWU-represented mechanics perform maintenance and repair work for various employers at marine terminals on the West Coast. (Exh. J-3 ¶18). In Seattle, the

majority of this work is done by IAM-represented mechanics, while in the nearby, larger port of Tacoma and other Puget Sound facilities, most maintenance and repair work is performed by employees represented by ILWU in the ILWU-PMA coastwise bargaining unit. (Id.). SSA Marine's maintenance and repair work is performed by IAM-represented mechanics at most West Coast ports; however, ILWU-represented mechanics perform SSA Marine's maintenance and repair work in San Diego, Portland, and several small ports. (Id.; Tr. 30, 68-69 (*DeNike*)). Until the commencement of the work that is the subject of the instant dispute, IAM-represented employees had performed all of SSA Marine's maintenance and repair work in the Port of Seattle. (Id.; Exh. J-3 ¶9). SSA Marine employs 70 to 80 IAM mechanics in the Seattle area; these mechanics work almost exclusively at Terminal 18 on Harbor Island. (Tr. 35 (*DeNike*)). PMA-member companies employ around 30 ILWU mechanics in steady positions in the Seattle area, (Tr. 147 (*Weber*)); another 30 to 50 ILWU longshore workers with mechanic qualifications are available to be dispatched to mechanic jobs when needed for such work. (Tr. 243, 251-260, 266-268 (*Harriage*)).

### **C. Applicable Collective Bargaining Agreements**

ILWU's collective bargaining agreement with SSA Marine is negotiated by PMA and is known as the Pacific Coast Longshore Contract Document (PCLCD). (Exh. J-3 ¶11; Exh. J-8, J-9; Tr. 27-28 (*DeNike*)). The PCLCD sets forth the terms and conditions of employment of longshore workers and mechanics at all West Coast ports. (Id.). From the late 1970s until July 1, 2008, the PCLCD provided in relevant part:

**1.7** This Contract Document shall apply to the maintenance and repair of containers of any kind and of chassis, and the movement incidental to such maintenance and repair. (See Section 1.8.)

1.71 This Contract Document shall apply to the maintenance and repair of all stevedore cargo handling equipment. (See Section 1.8.)

1.8 Any type of work assigned herein ... to longshoremen that was done by non-longshore employees of an employer or by subcontractor pursuant to a past practice that was followed as of July 1, 1978, may continue to be done by non-longshore employees of that employer or by subcontractor at the option of said employer.

(Exh. J-8 (2002-2008 PCLCD)).

Since 1978, ILWU and PMA have executed a number of letters of understanding establishing coast-wide rules regarding how PMA-member employers may hire mechanics. (ILWU Exhibit ("Exh. I")-2). In essence, PMA-member employers must first seek to hire mechanics from the existing pool of registered longshore workers in the joint ILWU-PMA Dispatch Halls. (Id.; Tr. 156-157 (*Weber*)). If no qualified workers are available in the existing registered workforce, the employer may then hire from the outside. (Id.). Once a mechanic hired from the outside has passed his/her probationary period, he/she becomes part of the registered longshore workforce. (Id.). Registered mechanics who do not work in steady positions are dispatched on an as-needed basis to waterfront employers in the same manner as registered longshore workers. (Tr. 240-242 (*Harriage*)). They are also eligible to "travel" (work temporarily in another port) or to permanently transfer their registration to another port if certain conditions set forth in the PCLCD are met. (Tr. 162-163 (*Weber*); Exh. J-8, J-9 (*PCLCD Supplement I*)).

Through the years, ILWU and PMA have also negotiated supplemental agreements in most West Coast ports that address local, operational issues other than the major provisions of the PCLCD, such as those establishing wage and benefit levels, holidays and vacations, grievance procedures, and prohibition of discrimination. (Tr. 158 (*Weber*); Exh. I-3). The

Supplementary Agreement for Seattle Mechanics, between PMA and ILWU Local 19, effective December 12, 2003, sets forth hours of work, probationary period, layoff and recall, and tool requirements, among other things. (Tr. 158 (*Weber*); Exh. I-4). Under the Supplementary Agreement, registered mechanics can transfer from one PMA-member employer to another with the consent of both employers. (Tr. 164 (*Weber*); Exh. I-4, Rule 6.36).

On July 1, 2008, PMA (including SSA) and ILWU entered into a Memorandum of Understanding that allows for the introduction of robotics to replace ILWU workers and as an offset substantially revises and expands ILWU jurisdiction under Sections 1.7 and 1.8 of the PCLCD. (Exh. J-3 ¶12; Exh. J-9, J-10 §IX; Tr. 48-51 (*DeNike*)). (Exh. J-3 ¶12; Exh. J-10 §IX; Tr. 48-51 (*DeNike*)). On these points, Section 1.72 provides:

It is recognized that the introduction of new technologies, including fully mechanized and robotic-operated Marine terminals, necessarily displaces traditional longshore work and workers, including the operating, maintenance and repair, and associated cleaning of stevedore cargo handling equipment. The parties recognize robotics and other technologies will replace a certain number of equipment operators and other traditional longshore classifications. It is agreed that the jurisdiction of the ILWU shall apply to the maintenance and repair of all present and forthcoming stevedore cargo handling equipment in accordance with sections 1.7 and 1.71 and shall constitute the functional equivalent of such traditional ILWU work. It is further recognized that since such robotics and other technologies replace a certain number of ILWU equipment operators and other traditional ILWU classifications, the pre-commission installation per each Employers past practice (e.g., OCR, GPS, MODAT, and related equipment, etc., excluding operating system, servers, and terminal infrastructure, etc.), post-commission installation, reinstallation, removal, maintenance and repair, and associated cleaning of such new technologies perform and constitute the functional equivalent of such traditional ILWU jobs. (See Section 1.81 and Letter of Understanding - Clarification and Exceptions to ILWU Maintenance and Repair Jurisdiction.)

Exh. J-19, p. 14)

ILWU and PMA further agreed that all maintenance and repair work on equipment used at "new" facilities would be assigned to ILWU mechanics. (*Id.*). Specifically, section 1.731

states:

In accordance with sections 1.7, 1.71, 1.72, and 1.73, the maintenance and repair work on all new Marine terminal facilities that commence operations after July 1, 2008, shall be assigned to the ILWU. New marine terminals shall include new facilities, relocated facilities, and vacated facilities. See Section 1.81 and Letter of Understanding - Clarification and Exceptions to ILWU Maintenance and Repair Jurisdiction.)

(Exh. J-10, p. 15)

No change was made to the PCLCD provisions authorizing PMA-member employers to assign existing maintenance and repair work to employees not represented by ILWU. (Exh. J-3 ¶12; Exh. J-10 §IX; Tr. 48-51 (*DeNike*)).

IAM contends that the Terminal 91 cruise terminal is not a new facility, but rather a relocation of existing cruise ship operations from Terminal 30. (Exh. J-3 ¶15). IAM also contends it has maintenance and repair jurisdiction throughout the Puget Sound for SSA Marine. (*Id.*). SSA Marine's collective bargaining agreement with IAM District Lodge 160, Local 289 states, "IAM-represented employees will maintain and repair all equipment owned or leased by SSA in the Puget Sound area." (Exh. J-3 ¶¶9-10; Exh. J-5, J-6, J-7). In his May 8, 2009 decision, Arbitrator Michael Cavanaugh ruled that SSA Marine's failure to assign maintenance and repair work at Terminal 91 to its IAM-represented employees violated this collective bargaining agreement. (Exh. J-12). As neither ILWU nor PMA were parties to this arbitration, the Arbitrator declined to decide whether the cruise terminal at Terminal 91 should be considered a new facility under the PCLCD, or whether SSA Marine was also obligated under the PCLCD to assign the work to ILWU-represented employees. (*Id.*).

#### **D. The Work In Dispute**

The work in dispute is the maintenance and repair work on SSA Marine/SSA Pacific's



stevedoring and terminal service power equipment while it is present at Terminal 91 in Seattle, Washington. (Exh. J-3 ¶17). Assignment of maintenance and repair work at Terminal 91 is controlled by SSA Marine through its contract with PMA-member Harbor Industrial Services Corporation, which employs ILWU mechanics in the ILWU-PMA coastwise longshore bargaining unit. (Exh. J-3 ¶8; Tr. 61, 95 (*DeNike*)). ILWU mechanics currently working at Terminal 91 are therefore employees of SSA Marine for purposes of the §10(k) hearing because SSA Marine assigns and controls the details of their work. (Exh. J-3 ¶8).

In April, 2009, the Port of Seattle opened a state-of-the-art cruise ship terminal facility at Terminal 91, complete with on-site parking and an expanded passenger processing center.<sup>34</sup> (Exh. J-3 ¶14). Although SSA had performed some break-bulk operations at that location, using ILWU longshoremen for the loading and IAM mechanics for maintenance and repair, the company had not had regular operations there for roughly 15 to 20 years prior to the opening of the cruise ship terminal. (Tr. 52, 79-80 (*DeNike*)).<sup>5</sup>

Terminal 91 is approximately 2.5 miles northwest of downtown Seattle and about seven miles from the other SSA Marine waterfront facilities where IAM mechanics work. (Exh. J-3 ¶20; Exh. J-11). Terminal 91 will receive cruise ships from about April to about October each

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<sup>3</sup>The Port closed an existing cruise ship terminal at Terminal 30, and began reconversion of that site to a container terminal. (Tr. 72-73, 101-102 (*DeNike*)). Terminal 30 had been used as a container terminal prior to 2000, and it will not be considered a new facility under the PCLCD. (Tr. 169-172 (*Weber*)). SSA Marine will continue to perform stevedoring services at Terminal 30 when the container terminal is operational. (Id.). Significantly, the IAM mechanics will continue to perform maintenance and repair work at Terminal 30 when it becomes a container terminal. (Tr. 102-103 (*DeNike*)).

<sup>4</sup>The Port operates another cruise terminal at Pier 66 in downtown Seattle, where IAM-represented employees of SSA Marine perform maintenance and repair work. (Tr. 74 (*DeNike*)). ILWU does not claim this work.

<sup>5</sup> Prior to the construction of the cruise ship terminal at Terminal 91, this facility had been used for storage, loading and unloading of automobiles and frozen or refrigerated cargo, such as fish and fruit. (Tr. 52 (*DeNike*); Tr. 246-247 (*Harriage*)). SSA Marine and other stevedoring companies contracted to perform these operations. (Id.; Tr. 194 (*Weber*)). SSA Marine had not regularly used Terminal 91 for 15 to 20 years prior to the opening of the cruise ship terminal in April, 2009. (Tr. 52, 79-80 (*DeNike*)).

year. (Id.). ILWU, PMA, and SSA Marine agreed that under the 2008 PCLCD, the Terminal 91 cruise terminal is a new facility, at which maintenance and repair work should properly be assigned to ILWU mechanics. (Exh. J-3 ¶14). The work on the SSA owned and leased power equipment at Terminal 91 is currently being performed by one full time mechanic represented by ILWU.<sup>6</sup> (Exh. J-3 ¶20; Tr. 45-46 (*DeNike*)). A part-time, ILWU represented mechanic, dispatched from the PMA-ILWU joint dispatch hall works on the days when passenger vessels are present at the terminal, usually Wednesdays, Saturdays, and Sundays. (Id.).

The work at Terminal 91 currently involves the maintenance and repair of the following equipment: approximately five (5) Grove R.T. 500 Series cranes; approximately fourteen (14) Mitsubishi electric pallet jacks; approximately three (3) Clark electric forklifts; approximately four (4) electric golf carts; approximately sixteen (16) Hyster and Mitsubishi propane forklifts; approximately two (2) Hyster diesel forklifts; approximately three (3) Ford Econoline shuttle vans; and approximately one (1) of each of the following: 15-ton Hyster forklift; Ford F-350 service truck; Ford Super Duty fuel truck; Ford Ranger for marine clerks; Chevy S-10 for marine clerks; cold ironing equipment for ship power, the two passenger gangways; and certain specialized platforms used in the loading and unloading ship stores, baggage, and other equipment on and off the passenger vessels calling at Terminal 91. (Exh. J-3 ¶19; Tr. 25-26 (*DeNike*)). Much of this equipment was previously used at Terminal 30, and maintained by IAM represented mechanics based at Terminal 18. (Exh. J-3 ¶22; Tr. 109 (*DeNike*)). The equipment was packaged and transported to Terminal 91 by ILWU-represented employees. (Exh. J-3 ¶22).

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<sup>6</sup> Traditionally, IAM-represented employees of SSA Marine have performed maintenance and repair work on SSA-owned or leased equipment at the piers where that equipment was used. (Exh. J-3 ¶¶21, 23). In the event that maintenance and repair is particularly complicated or requires special tools or special manuals, ILWU-represented employees transport the equipment to Terminal 18, where IAM-represented employees have always performed maintenance and repair work for SSA Marine, its affiliates and its predecessors. (Exh. J-3 ¶21). As noted, Terminal 18 is approximately 7 miles from Terminal 91. (Exh. J-3 ¶20; Exh. J-11).

However, Terminal 91 also has a significant amount of new equipment that are maintained and repaired by ILWU mechanics, including five cranes (Tr. 109 (*DeNike*)) and a passenger gangway that is “large, complicated [and] very expensive.” (Tr. 104:3 (*DeNike*)). In addition, ships docking at Terminal 91 are required to connect to electrical power from the mainland rather than run their own engines, a process known as “cold ironing.” (Tr. 26, 59, 96-97, 111-112 (*DeNike*)). ILWU mechanics service these new pieces of equipment at Terminal 91, which were never located or serviced at Terminal 30. (*Id.*).

### **III. ARGUMENT**

Once it has been determined that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that the dispute is properly before the Board, the Board must decide which group of employees is entitled to the disputed work and make and award accordingly. *Teamsters Local 107 (Safeway Stores)*, 134 NLRB 1320, 1322 (1961), citing *NLRB v. Radio & Television Broadcast Engineers Union Local 1212*, 364 U.S. 573, 585 (1961) (“*CBS*”). “The determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors in the particular case.” *Machinists Lodge 160 (SSA Marine)*, 347 NLRB 549, 553 (2006), citing *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402, 1410-1411 (1962). Among the factors relevant to determining which group of employees is entitled to the disputed work are: (1) applicable certifications and collective-bargaining agreements; (2) employer preference and past practice; (3) area and industry practice; (4) relative skills and experience; and (5) economy and efficiency of operations. *Id.* These factors, taken as a whole, but particularly the Employers’ preference, industry practice, the longshore job preservation objective of the work assignment, the enhanced efficiencies and economies gained from using only one full-time ILWU mechanic, supplemented

with complete flexibility by the joint ILWU/PMA dispatch hall, compel awarding the work in dispute to Longshore mechanics represented by ILWU.

The instant case is only the latest in a long-running series of disputes between ILWU and IAM regarding which union is entitled to perform certain maintenance and repair work at marine terminals on the West Coast. (Tr. 168-169 (*Weber*)). Both ILWU and IAM have prevailed in such cases. See, e.g. *Machinists Lodge 160 (SSA Marine)*, 347 NLRB 549 (2006) (IAM awarded maintenance work at SSA Marine in Everett, Washington); *Machinists District 190 (SSA Terminal)*, 344 NLRB 1018 (2005)(quashing section 10(k) notice where SSA had assigned the disputed work to both ILWU and IAM); see also, Exh. J-31, which is *Pacific Crane Maintenance Company* ("PCMC"), ALJ Decision No. JD(SF)-09-09 (February 12, 2009) (holding ILWU lawfully represents over 100 mechanics performing waterfront maintenance work in Tacoma, Washington and Oakland, California under the coastwise PCLCD). The determining factor in all these cases has been the employer's preference. Thus, in the Everett case, while the Board found that the competing contractual provisions, mixed area and industry practices and the economy and efficiency of operations favored neither ILWU or IAM, the Board awarded the Everett maintenance and repair work to IAM based largely on employer preference.<sup>7</sup>

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<sup>7</sup> The Board also found that since the "two ILWU-represented employees are qualified to begin on-the-job training in the service and maintenance of the new machinery.... this factor favors awarding the work in dispute to IAM represented employees." 347 NLRB at 552. In the instant case, the undisputed record shows that in the Port of Seattle there are at least 30 qualified ILWU mechanics that can well perform the disputed work and, likewise, SSA prefers to award the Terminal 91 work to ILWU mechanics.

**A. CERTIFICATIONS AND CBAs—ILWU Is Entitled To The Disputed Work Under Its Collective Bargaining Agreement With PMA**<sup>8</sup>

As shown in Section II.C. above, ILWU is entitled under PCLCD Section 1.71 to perform “maintenance and repair of all stevedore cargo handling equipment” used by PMA-member companies. Under Section 1.72, effective July 1, 2008, ILWU is entitled to all maintenance and repair work at “new” facilities operated by PMA-member companies. SSA Marine is a PMA-member company, and the disputed work clearly involves the maintenance and repair of stevedore cargo handling equipment. (See Section II.C. above). Further, the cruise ship terminal at Terminal 91 is clearly a “new” facility, both in terms of the reconstruction of the site and the fact that SSA Marine had not regularly performed stevedoring operations there in the previous 15 to 20 years. (See Section II.D. above). While IAM tried at the hearing to create a factual dispute concerning whether Terminal 91 is actually “new” under the PCLCD, established Board law specifies that such questions are subject to the lawful determinations of the contracting parties, namely SSA, PMA and ILWU. Thus, for example, in prior section 10 (k) disputes involving PMA, ILWU and the West Coast Longshore industry, the Board deferred to the joint determinations of the PMA employers and ILWU concerning what types of equipment constituted “new” equipment to be assigned to ILWU. *ILWU (Howard Terminal)*, 147 NLRB 359, 366 (1964). On this point, the Board explained:

There may be room for disagreement with respect to the meaning of the ILWU-PMA agreement as to whether the whirly cranes are “new” equipment to be operated by longshoremen or “old” or existing equipment which may be operated

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<sup>8</sup> ILWU is certified as the representative of “workers who do longshore work in the Pacific Coast ports of the United States for the companies that are members of” the employer associations that later merged to form the PMA. *Shipowners’ Assn. of the Pacific Coast*, 7 NLRB 1002 (1938). The record contains no evidence that IAM is certified as the representative of any employees of SSA Marine. However, the parties have stipulated that SSA Marine is not failing to conform to any Board certification. (See Section II.A. above). The factor of Board certifications therefore does not favor changing the status quo, under which ILWU-represented mechanics perform the disputed work.

by non-longshoremen. As stated above, however, the Joint Coast Labor Relations Committee determined that the whirly cranes were "new" equipment which, under the terms of the ILWU-PMA agreement, was to be operated by longshoremen. The Employers and Respondents agree that this is the proper interpretation to be placed on their agreement. We find nothing in this interpretation which is repugnant to the Act, or to the considerations normally attendant upon our resolution of jurisdictional disputes.

147 NLRB at 366.

Accordingly, the Board upheld PMA's and its member company's preference to assign the work of operating, what they considered to be "new," equipment under the PCLCD. For the same reasons, the Board here should not attempt to second-guess the joint determinations of PMA, SSA and ILWU that the newly constructed, state-of-the-art, passenger terminal facility at Terminal 91 constitutes a "new" facility within the meaning of section 1.731 of the PCLCD. *See, also, United Industrial Workers of North America ("UIW") (Albin Stevedore Company)* 162 NLRB 1005, 1011 (1967) ("Indeed, the substantial changes brought by the introduction of the new type of cargo ship and new type of crane could be readily likened to the establishment of an entirely new operation.")(Awarding to ILWU workers the operation of new cranes to handle new containerized shipping based on employer preference and contractual settlement of new work assignments to offset automation.) Therefore, there can be no doubt that under the PCLCD, ILWU is entitled to perform maintenance and repair work at Terminal 91.<sup>9</sup>

IAM will claim that it is entitled to the maintenance and repair work at Terminal 91 under its collective bargaining agreement with SSA Marine and Arbitrator Cavanaugh's May 8, 2009 decision holding that SSA Marine violated that agreement by not awarding the work to its IAM-

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<sup>9</sup> Insofar as the IAM may suggest that the new jurisdiction provisions to offset robotics automation found in sections 1.7 and 1.8 of the 2008 PCLCD violate section 8(e) of the Act, it is well settled that the Board finds it "unnecessary and inappropriate to reach the 8(e) issue" in a section 10(k) proceeding. *Teamsters Local 85 (Pacific Maritime Association)*, 208 NLRB 1011, 1014 (1974)(awarding the work of moving containers on and off truck-trailers, previously done by Teamsters, to ILWU longshoremen to offset loss of longshore jobs from containerization.)

represented employees. However, as Arbitrator Cavanaugh himself pointed out, ILWU was not a party to that arbitration proceeding and he did not have authority to determine the rights and obligations of SSA Marine under the PCLCD. (Exh. J-12). Thus, even if IAM does have the right to the disputed work under its collective bargaining agreement with SSA Marine, IAM's claim to this work is no stronger than that of ILWU under the PCLCD.<sup>10</sup> Further, when both unions' collective bargaining agreements "contain provisions arguably covering the work in dispute, ... the factor of collective bargaining agreements does not favor an award of the disputed work to either group of employees." *IAM Local 724 (Holt Cargo)*, 309 NLRB 377, 380 (1992), *enfd* 30 F.3d 1487. Accordingly, the factor of collective bargaining agreements does not favor changing the status quo, under which ILWU-represented mechanics perform the disputed work.

**B. EMPLOYER PREFERENCE AND PAST PRACTICE—SSA Marine's Preference Is For ILWU-Represented Employees To Perform The Disputed Work**

SSA Marine Senior Vice President Edward DeNike stated unequivocally that SSA Marine's preference was for ILWU-represented mechanics to perform maintenance and repair work at Terminal 91. (Tr. 34, 62, 71 (*DeNike*)). DeNike explained that SSA Marine had made a commitment as part of the PMA to award maintenance and repair work at new facilities to ILWU, and that "it was in the best interest of the industry for SSA to go along with that commitment." (Tr. 92-93 (*DeNike*)). DeNike testified that he explained SSA Marine's position to various IAM officials, including Don Hursey. (*Id.*).

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<sup>10</sup> It is well-established that an arbitrator's award interpreting only one of the conflicting collective bargaining agreements is not binding on the Board in a §10(k) proceeding. *See, e.g. Machinists Lodge 190 (Sea-Land Service)*, 322 NLRB 830, 835 (1997).

As part of PMA, SSA Marine bargains with ILWU. (Tr. 38-39 (*DeNike*)). The PMA/ILWU collective bargaining agreement is a single agreement covering all longshore workers, mechanics and marine clerks at all West Coast ports. (Tr. 145-146 (*Weber*)). When SSA Marine and the other PMA-member companies bargain with ILWU, they first develop a single bargaining position, which is then presented to ILWU by PMA negotiators. (Tr. 151 (*Weber*)). In the agreement PMA made with ILWU in 2008, PMA-member companies have committed to awarding maintenance and repair work at new facilities to ILWU-represented mechanics. (Tr. 47 (*DeNike*); Tr. 179 (*Weber*)). In effect, the 2008-2014 PCLCD is an expression of the preference of all PMA-member employers for ILWU-represented mechanics at these new facilities. It is undisputed that SSA Marine directly participated in the PMA-ILWU contract negotiations. (Tr. 38-39 (*DeNike*)).

At the hearing, IAM claimed that SSA Marine's true preference is for IAM, and that any preference SSA officials might express for ILWU is actually the preference of PMA, not SSA Marine. (Tr. 393 (*Hursey*)). The clear and unequivocal testimony of SSA's representative, Ed DeNike, refutes this claim. (Tr. 34 (*DeNike*)). Hursey admits he was upset that SSA Marine was "giving our work away," (Tr. 399:8), and demanded an explanation from DeNike. (Tr. 405). According to Hursey, DeNike further stated: "Even though I was forced, it was a commitment I made and it's something I'm going to have to do." (Tr. 393:20-22 (*Hursey*)). DeNike flatly denied using the term "forced," (Tr. 93:8-11 (*DeNike*)). Whatever De Nike may have said to the IAM representative, it is undisputed that the purpose of the conversation was to appease IAM and try to prevent job actions. As SSA Marine continues to employ IAM-represented mechanics, DeNike clearly had an interest in maintaining good relations with Hursey. (Tr. 410 (*Hursey*)). Hursey himself agreed that collective bargaining often involves give and take, and that parties



sometimes compromise on some issues in order to obtain a global resolution. (Tr. 403-404).

Therefore, no matter how IAM tries to characterize DeNike's conversations with Hursey, IAM cannot deny that DeNike told Hursey that SSA Marine had made a commitment to the PMA and to ILWU, and that SSA would abide by that commitment.

In any case, to the extent IAM is suggesting that the preferences of the entire longshore industry, as represented by PMA, somehow lack any weight here, it contradicts controlling law. In several Section 10(k) proceedings arising from the first wave of waterfront mechanization -- containerization -- the Board explicitly and emphatically gave substantial weight to the interests of all PMA member companies, as an industry, in upholding new work assignments to ILWU longshore workers who would otherwise be displaced by such automation. See, e.g., *Teamsters Local 85 PMA*, 208 NLRB at 1015 ("These cases have arisen because of PMA's need to mechanize and improve the efficiency of its operations. Moreover, though containers are the focus of these disputes, the record convinces us that a meaningful inquiry into economy and efficiency cannot be limited to the precise operations involved in the disputes here. Because of the nature of the industry, and that of the employment relationship, it is not only the longshoreman who has an interest in the availability of longshore work, but also the Employer."); *UIW (Albin Stevedore Company)*, 162 NLRB at 1011-1012 (agreeing "to view this dispute against the background of protracted negotiations" between PMA and ILWU to provide longshoremen the new work of operating cranes, previously operated by Operating Engineers, because containerization "will eliminate not only longshoremen formerly employed as crane and winch operators, but other traditional longshoremen classifications such as forklift drivers and swingman."); *ILWU (Howard Terminal)*, 147 NLRB at 366 (holding, "the automation concord set forth in the present agreement between the Respondents and the Employers is a most

persuasive circumstance in this case.... to lighten the impact of unemployment problems created by automation” and compelling the conclusion that "longshoremen are entitled to perform the disputed work."); *ILWU Local 19 (Albin Stevedore Company)*, 144 NLRB 1443, 1448 (1963) (holding that "the larger automation concord between Respondents and PMA far outweighed all other considerations.")

When an employer has clearly expressed a preference for employees represented by one of the competing labor organizations, and has awarded the work to employees represented by that labor organization, the employer’s preference strongly favors awarding the work as the employer intended. *Machinists Local 160 (SSA Marine)*, 347 NLRB 549(2006) (upholding SSA Marine's preference for IAM with respect to the Port of Everett). The Board “does not generally examine the reasons for an employer’s preference unless there is evidence that the employer was coerced into its preference.” *Quarry Workers Local 829*, 335 NLRB 1358, 1360 n.5 (2001). Here, ILWU has engaged in no coercive activity—indeed, it was Respondent IAM that threatened to picket the site of the disputed work. And even in the face of IAM’s threats, SSA Marine maintains its preference for ILWU. This factor overwhelmingly favors preservation of the status quo, under which ILWU-represented mechanics perform the disputed work.

With respect to past practice, while it is true that SSA Marine has traditionally assigned mechanic work to IAM at other locations, it deserves little weight here because SSA has not had regular operations at Terminal 91 for 15 to 20 years and the passenger terminal operations involve substantially new equipment, including five new cranes, the state-of-the-art automated passenger ramps and the cold ironing equipment for the ships. See, e.g., *UIW (Albin Stevedore Company)* 162 NLRB at 1011; ("Indeed, the substantial changes brought by the introduction of

the new type of cargo ship and new type of crane could be readily likened to the establishment of an entirely new operation.")

**C. AREA AND INDUSTRY PRACTICES—Both IAM And ILWU Perform Similar Work At Other Terminals In The Puget Sound Area And At Other West Coast Ports**

The parties have stipulated that (1)“both IAM and ILWU mechanics perform maintenance and repair work on the West Coast,” (2) that IAM-represented mechanics perform the majority of such work in Seattle, while ILWU-represented mechanics perform the majority in Tacoma and most other Puget Sound area ports, and (3) that IAM-represented mechanics perform the majority of the maintenance and repair work for SSA Marine on the West Coast, except in Portland, San Diego, and several smaller ports, where such work is performed by ILWU-represented mechanics. (Exh. J-2, ¶18). As found in *Machinists District Lodge 160 (SSA Marine)* 347 NLRB at 522, since both ILWU and IAM workers perform maintenance and repair work on waterfront terminals throughout the West Coast, the factor of industry and area practice therefore does not favor changing the status quo, which here has ILWU-represented mechanics performing the disputed work.

**D. RELATIVE SKILLS AND EXPERIENCE—Both IAM And ILWU Mechanics Are Capable Of Performing The Disputed Work**

SSA Marine Senior Vice President Edward DeNike testified that ILWU mechanics are competent to perform the maintenance and repair work at Terminal 91. (Tr. 34, 46-47, 77-78). The single full-time position at Terminal 91 is filled by John Castronover, who applied in response to a job posting by PMA member Harbor Industrial Services Corp. (Exh. I-6, I-7, I-8). Castronover has extensive experience and training as a mechanic in the longshore industry, (Tr. 184-186 (*Weber*); Exh. I-9), and his qualifications for the work at Terminal 91 cannot be

disputed. Castronover had been working as a mechanic at PMA member Bridge Warehouse, and either he or another ILWU mechanic likely would have been laid off had he not gotten the job at Terminal 91. (Tr. 190-191 (*Weber*). Instead, Local 19, Bridge Warehouse, and SSA Marine negotiated an agreement under which Castronover could work at Terminal 91 during the April to October cruise season, and return to Bridge Warehouse for the remainder of the year. (Tr. 187-188 (*Weber*)).

ILWU has stipulated that IAM mechanics are capable of performing the disputed work. (Tr. 58-59). IAM has refused to stipulate that ILWU mechanics are also capable of performing the work, arguing at the hearing that IAM-represented employees are the "better qualified." IAM presented as witnesses two of its members, who testified extensively regarding their own qualifications, (Tr. 269-295 (*Lageson*); 353-378 (*Bawden*)), but elicited no testimony regarding any deficiencies in the qualifications of ILWU-represented mechanics. In fact, SSA Marine officials DeNike and Stephens, and PMA official Weber all testified that the ILWU mechanics are fully skilled and competent to service the power equipment at Terminal 91 ,and that there hasn't been a single complaint of poor performance. (Tr. 34, 46-47, 77-78 (*DeNike*); Tr. 343 (*Stephens*); Tr. 187-188 (*Weber*)). The undisputed record further shows that another 30 ILWU longshore workers have adequate mechanic skills to also perform the work in question through the ILWU-PMA joint dispatch hall. (Tr. 243, 251-260, 266-268 (*Harriage*)) *ILWU Local 19 (West Coast Container Service, Inc.)*, 266 NLRB 193, 198 (1983) ("While the Employer notes that only about 7% of ILWU members possess the Washington State combination license necessary to drive a tractor-trailer on public highways as they would be required to do at Terminal 25 in performing the disputed work, the record is clear that about 50 ILWU members possess such combination licenses. In light of the fact that the Employer only assigns two of its

employees to spend about half of their time performing the disputed work, a pool of 50 employees would certainly be sufficient to provide an adequate source of drivers with the requisite skills.") It is clear then that both the ILWU- and IAM-represented workforces are competent to perform maintenance and repair work at Terminal 91.<sup>11</sup> When both groups of employees have the skills and training necessary to perform the work in dispute, this factor will not favor an award to either group. *Laborers (Eshbach Bros.)*, 344 NLRB 201, 204 (2005). The factor of relative skills and training therefore does not favor changing the status quo, under which ILWU-represented mechanics perform the disputed work.

**E. It Is More Economical And Efficient For SSA Marine To Use ILWU Mechanics**

SSA Marine gains a number of efficiencies by employing mechanics who are part of the registered longshore workforce. First, under the PCLCD, ILWU mechanics can perform maintenance and repair work on-site at Terminal 91, (Tr. 37 (*DeNike*)), whereas equipment would need to be transported about seven miles to Terminal 18 if IAM mechanics were to perform the work. (Tr. 247 (*Harriage*)). Second, because SSA can order labor as needed from the ILWU/PMA dispatch hall, the company can employ only one full-time ILWU mechanic when ships are not at dock and hire supplemental mechanics on days when the cruise ships are in port. Thus, the ILWU workforce is more flexible and able to meet peak weekly and seasonal demand. (Tr. 45-46 (*DeNike*)). In addition, many ILWU mechanics are specially trained and qualified to operate the equipment they fix and also perform other longshore work (Tr. 166-167 (*Weber*)). When ships are then, there are over 100 ILWU longshoremen performing the

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<sup>11</sup> IAM will likely point to the findings in the *Everett* case that the ILWU workforce in that port lacked sufficient skills to service a new imported crane. *Machinists District Lodge 160 (SSA Marine)* 347 NLRB at 522. However, the facts there are clearly limited to the particular skills, or lack thereof, of the relatively small longshore workforce represented by ILWU Local 32 in Everett as compared to the several hundred longshoremen and qualified mechanics represented by ILWU Local 19 in the Port of Seattle in the instant case.

stevedoring work at Terminal 91, operating the power equipment that the ILWU mechanics service. (Id.). It is undisputed that traditional longshoremen and ILWU mechanics are cross-trained and may interchangeably work various longshore jobs including that of mechanic. (Tr. 243, 251-260, 266-268 (*Harriage*)). Thus, the ILWU workforce is more flexible and able to meet peak weekly and seasonal demand. (Tr. 45-46 (*DeNike*)). Third, SSA's use of ILWU labor prevented at least one layoff—that of John Castronover. (Tr. 190-191 (*Weber*)). As SSA Marine is required to pay into the ILWU/PMA Pay Guarantee Plan, which compensates longshore workers when, as now, work is slow, SSA has an incentive to keep the registered longshore workforce of all PMA employers working as much as possible. (Tr. 192 *Weber*)). No IAM-represented mechanics have been laid off as a result of SSA Marine's award of the Terminal 91 work to ILWU.<sup>12</sup> (Tr. 83 (*DeNike*)).

When, as here, one of the two competing unions represents other workers at the jobsite, the Board generally finds that the factor of efficiency of operations favors awarding the work to that union. *Laborers (Eshbach Bros.)*, 344 NLRB at 204; *Machinists District 118 (Meredith Printing)*, 243 NLRB 892 (1979). When one group of employees is more versatile, the factor of efficiency also favors awarding the work to that group. *Laborers (E&B Paving)*, 340 NLRB 1256 (2003). Indeed, noting the same elements of cross-training, job interchange and use of temporary employees through the joint dispatch halls, the Board has on many occasions found these features of the ILWU-PMA bargaining unit to warrant a finding of greater economies and efficiencies in awarding the work to ILWU represented workers. See, e.g. *Teamsters Local 85 (PMA)*, 208 NLRB at 1016 (“It is easier and more practical to attract and maintain a pool of

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<sup>12</sup> Indeed, as around 10% of the IAM-represented employees of SSA Marine have retired in the past year, (Tr. 80-81 (*DeNike*)), it is likely that SSA would have to hire someone new if IAM were awarded the work.

longshoremen of the size necessary to perform the required work during peak periods and it reduces the amount of money the Employer may be required to pay out under the mechanization and modernization agreements between PMA and the ILWU. In short, it permits the Employer greater economy and the available and versatile workforce necessary to its operations. Similarly, the use of longshoremen to load and unload containers employs those who might otherwise receive pay under the guarantees without performing useful work.")(awarding to ILWU longshoremen the work of loading and unloading trucks at marine terminals); *Teamsters Local 85 (PMA)*, 191 NLRB 493, 496 (1971) ("The familiarity and experience obtained as a longshoreman in the use of all types of gear is very helpful if not, in fact, necessary, to a gearman. In addition, a gearman must be able to operate the mechanical gear such as pay loaders and tractors used in longshore work since he is required to load and unload such mechanical gear from the gear trucks. If a gearman's services are not required by one of the PMA members he can be dispatched as an ordinary longshoremen from the hiring hall.")(awarding the work of the gear truck driving to ILWU longshoremen); *UIW (Albin Stevedore Company)*, 162 NLRB at 1011 ("As noted, the evidence shows that longshoremen with hatchtending experience are capable of interchanging between the positions of hatchtender and hammerhead operator. Thus, the periodic interchange by longshoremen between the two positions would eliminate the need for a relief operator, and enable the operator to perform safer and more efficiently by virtue of his familiarity with the physical conditions aboard ship.") (awarding to ILWU longshoremen the operation of the hammerhead cranes that were previously performed by Operating Engineers).

ILWU-represented longshore workers will continue to perform the stevedoring work at Terminal 91 regardless of who performs maintenance and repair of the equipment they use. However, it cannot be disputed that ILWU mechanics are more versatile than the IAM workforce

with respect to the various jobs to be performed at Terminal 91. The factor of efficiency therefore favors maintaining the status quo, under which ILWU-represented mechanics perform the disputed work.

### **CONCLUSION**

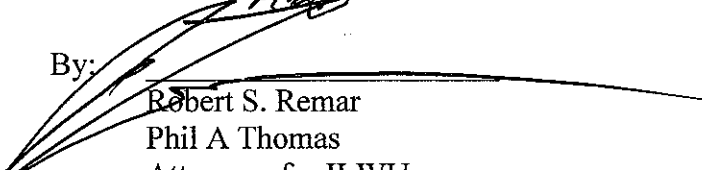
When all of the relevant factors are considered, it is clear that maintenance and repair work at Terminal 91 should remain with ILWU. SSA Marine awarded the work to ILWU initially, and clearly prefers that the work remain with ILWU. Moreover, the assignment of the maintenance and repair work at Terminal 91 comports with the 2008 industry-wide contract settlement that calls for the introduction of robotics that will necessarily eliminate ILWU longshore work opportunity and job security. Under the series of cases cited above, involving virtually identical circumstances of waterfront mechanization, the Board has consistently given full force and effect to such contractual resolutions to offset longshore job losses. Because SSA Marine can order labor as needed from the ILWU-PMA dispatch hall, the ILWU workforce is clearly more economical and efficient. The other three factors—collective bargaining agreements, industry practice and relative skill levels—are at worst neutral, and therefore do not favor changing the status quo. Accordingly, the work in dispute should be awarded to mechanics represented by ILWU.

Dated: July 24, 2009

Respectfully Submitted,  
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By:



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### **PROOF OF SERVICE**

I am employed in the County of San Francisco, State of California. I am over the age of 18 years old and not a party to the within action; my business address is 1188 Franklin Street, Suite 201, San Francisco, CA, 94109.

On July 24, 2009, I served a true and accurate copy of **INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 19'S POST HEARING BRIEF** on all interested parties in this action as follows:

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- [XX] BY MAIL: I enclosed the document(s) above in a sealed envelope or package addressed to the persons at the addresses above. Following ordinary business practices, the envelope was sealed with postage fully prepaid and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date at San Francisco, CA.
- [ ] BY FACSIMILE: From (415) 771-7010, I faxed the document(s) to the person(s) at the fax number(s) listed above. No error was reported by the fax machine that I used.
- [ ] BY E-MAIL: I caused the documents to be sent to the person at the electronic notification address(es) listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under the penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July 24, 2009 at San Francisco, California.

  
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ROBERT S. REMAR